

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
March 28, 2006 Session

**STATE OF TENNESSEE v. EARL MARION GRINDSTAFF**

**Direct Appeal from the Circuit Court for Cocke County  
No. 9437 Ben W. Hooper, II, Judge**

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**No. E2005-02059-CCA-R3-CD - Filed June 6, 2006**

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The defendant, Earl Marion Grindstaff, pled guilty to five counts of aggravated sexual battery with the length and manner of service of the sentences to be determined by the trial court. Following a sentencing hearing, the defendant was sentenced to an effective sentence of thirty years. On appeal, the defendant argues that the trial court: (1) erred in sentencing him and (2) erred in denying him alternative sentencing. Following our review of the record and the parties' briefs, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Keith E. Haas, Assistant Public Defender, Newport, Tennessee, for the appellant, Earl Marion Grindstaff.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Tracy Lee Stone, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**BACKGROUND**

The defendant pled guilty to five counts of aggravated sexual battery with the length and manner of service of the sentences to be determined by the trial court. The facts of the case presented by the prosecutor at the guilty plea hearing were as follows:

[O]n at least five occasions beginning December . . . of 2003 and ending in February of 2004, . . . this Defendant had inappropriate sexual conduct . . . with a female child under the age of 13. I believe she was 12 at the time. This occurred at [the

defendant's] home, when the victim visited [the defendant's] home with [the defendant's] granddaughter. She was friends with his granddaughter, spent the night over there.

Basically, [the defendant's] own statement . . . to Detective Robert Caldwell with the Cocke County Sheriff's Department. He gave that statement . . . in which he admitted to touching inappropriate parts of the girl, including her breasts or vagina/crotch area, her behind, on at least five distinct, separate occasions.

And that took place . . . [in the defendant's] home . . . in the Cosby area. In any event, it's in Cocke County.

The proof would have been corroborated by the testimony of the victim. She would have testified not only to these events, but several others. . . .

Notably . . . I think she would have . . . testified to at least three events that probably would have amounted to rape of a child involving digital penetration on three distinct occasions. . . .

At the sentencing hearing, the victim, V.Z.,<sup>1</sup> testified that she lived across the street from the defendant and used to visit his house with her friend, the defendant's granddaughter. The victim explained that when she would spend the night at the defendant's house, she and the defendant's granddaughter would sleep on the floor beside his bed. During these overnight visits, the defendant would "try to do stuff to [her]," including touch her breasts and between her legs. She remembered that the defendant would touch her under her bra and sometimes under her pajamas and underwear. The defendant would touch her just about every time she stayed at his house. The victim also remembered that the defendant put his fingers inside her vagina on more than one occasion.

The victim expressed that the defendant's touching scared her, but she continued to spend the night to "protect his granddaughter. . . . [s]o he wouldn't do the same thing that he did to me to her." She never told an adult about what went on at the defendant's house, but a friend told the school guidance counselor who got involved. The victim was eleven or twelve years old when these incidents occurred.

The victim described the negative impact the defendant's actions have had on her. She explained that she does not talk to many people any more, and that her relationship with her mother is "[s]o, so." Further, she does not get along with her brother, she has had problems in school, and she goes to counseling. She explained that overall the sexual batteries have affected her a "[w]hole lot."

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<sup>1</sup>It is the policy of this court to not reveal the name of a minor victim of a sex crime.

On cross-examination, the victim admitted that prior to the incidents there were times she did not get along with her mother and would throw a fit. She also admitted that she would sometimes throw a fit in front of the defendant and his wife. The victim further admitted that she and her mother “got in a fight [a few months earlier] and [she] got sent away” for a week.

On redirect examination, the victim testified that she had recently seen the defendant in his yard while she was outside of her house and he “just look[ed] at [her].” On recross examination, the victim admitted that when her dog recently ran over into the defendant’s yard, the defendant did not come outside or treat her bad in any way.

The trial court noted that the victim’s family wrote a lengthy statement to the court. However, our review indicates that this statement was not made an exhibit at the sentencing hearing, nor included in the record on appeal.

The pre-sentence report was introduced as an exhibit at the sentencing hearing. The report revealed that the defendant’s criminal history consisted of two instances of failing to have a hunting or fishing license and possibly a misdemeanor charge several years ago in Virginia. The report also indicated that the defendant earned his G.E.D., served in the military for almost twenty-two years, and worked steadily as a truck driver since coming out of the military.

The defendant’s written confession was also introduced as an exhibit at the sentencing hearing. The statement was as follows:

I have known [the victim] and her mother . . . about a year. About a year ago they started coming to my residence. They live [across] the street from me and my wife. [The victim] started staying the night with my granddaughter . . . [The victim] spent the night several times this past December 03[.] I touched [the victim] on [her breasts]. I touched her through her [clothes]. I was curious about her [breast] size. This [occurred] at my residence . . . in the computer room. I touched [the victim] again in January 04 in between her legs. She was in my living room wearing shorts[;] she had her legs spread apart. I put my hand in between her shorts and panties. [The victim] did not say anything or tell me to [quit]. [The victim] was in the living room by herself. I [stopped] because I was scared. I knew it was wrong. I touched [the victim] again in February 04. This [occurred] in my living room. I think she had a thong on. I touched her butt by [putting] my hand down in her shorts. I touched her one more time when [the victim] was [sitting] on a recliner in my living room. I touched [the victim] between her legs[.] She had shorts on then with her legs spread. [In] February 04[,], I touched [the victim’s breasts] by [putting] my hand up her shirt and feeling of her bra. [The victim] manipulated me. [T]he [clothes she] wore were revealing. And were sexually revealing. When I would do this I would be scared. [The victim] would look at me and grin and spread her legs. [The victim] would grin when I would touch her and seemed to enjoy me touching her. . . .

. . . .

I . . . am sorry I let this go this far, and let these thing[s] happen. . . . I should have had better judg[ment] of this and not let [the victim] . . . manipulate me . . . .

The defendant introduced exhibits at the hearing regarding his medical condition, present employment, and request for diversion.

Following the sentencing hearing, the trial court sentenced the defendant to ten years per count, “neither the minimum, nor . . . the maximum.” The court then ordered that three counts be served concurrently and two counts be served consecutively for a total effective sentence of thirty years. The defendant appealed.

## ANALYSIS

This court’s review of a challenged sentence is a de novo review of the record with a presumption that the trial court’s determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). Specifically, the trial court must place on the record its reasons for imposing the specific sentence, which includes identifying the mitigating or enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors were evaluated and balanced in determining the sentence. *See State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). If the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. In conducting our de novo review of a sentence, this court must consider (a) the evidence adduced at trial and the sentence hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant’s potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

## Sentencing

The defendant first argues that the trial court erred in sentencing him. Specifically, he challenges the enhancement of his sentences, the lack of weight given to the mitigating factors, and the ordering of consecutive sentencing on two of the counts.

Initially, we note the trial court failed to place on the record its findings in support of the sentences imposed; therefore, our review is de novo with no presumption of correctness. However, after our review, we conclude that the record supports the defendant’s sentences. The defendant pled

guilty to five counts of aggravated sexual battery, a Class B felony. *Id.* § 39-13-504(a)(4), (b). As a Range I offender, the defendant was subject to a potential sentence of eight to twelve years per count with the presumed sentence being eight years. *Id.* § 40-35-112(a)(2), -210(c)(1). However, this sentence could be enhanced or reduced based upon the existence of applicable enhancement or mitigating factors found in Tennessee Code Annotated sections 40-35-113 and 114. *Id.* § 40-35-210(c)(2). The weight given to each enhancement or mitigating factor was left to the discretion of the trial court based upon the record before it. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

To begin, we note that at the sentencing hearing, the state discussed enhancement factors and urged the trial court to enhance the defendant's sentences accordingly. Although the trial court failed to specifically note which enhancement factors it relied upon, our review of the record supports the enhancement of the defendant's sentences based on a combination of enhancement factor five, the victim was particularly vulnerable because of her age, and enhancement factor sixteen, the defendant abused a position of private trust. *See* Tenn. Code Ann. § 40-35-114(5), (16) (2003).<sup>2</sup> The victim was eleven or twelve years old at the time of these incidents. On at least ten occasions, the victim was entrusted to the defendant's care as she spent the night with her friend, the defendant's granddaughter. On those nights, the defendant served as the parental figure for the victim. Although the victim's age alone is not enough to support the enhancement of the defendant's sentences, in our view, the defendant's repeated abuse of his position of private trust paired with the victim's age do support such enhancement.

Further, we note the trial court did mention certain mitigating factors, such as the defendant's lack of a prior record, military history, employment history, and that his conduct did not cause or threaten serious bodily injury. Nonetheless, the trial court found "though noteworthy . . . of no help in this case as far as mitigating these crimes." Likewise, it is our view that under the circumstances, these mitigating factors are entitled to little or no weight. The defendant's conduct was not a one-time occurrence or accident but instead a repeated and volitional abuse of a minor child who was entrusted to his care. Thus, we conclude the defendant's mitigating evidence did not support a lesser sentence.

Now that we have determined the record supports the trial court's imposition of a ten year sentence on each count, we must address the trial court's ordering of consecutive sentences. We note, when a defendant is convicted of more than one criminal offense, the trial court may order the sentences to run concurrently or consecutively as guided by Tennessee Code Annotated section 40-35-115. Pursuant to this code section, a trial court may order consecutive sentencing if any of the following criteria are found by a preponderance of the evidence:

- (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;

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<sup>2</sup> We are utilizing the numbering of the enhancement factors in place at the time of the defendant's sentencing although the numbering has since changed.

- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

*Id.* § 40-35-115(b).

Although meager, the trial court did make findings on the record regarding consecutive sentencing, seemingly relying on subsection (b)(5). The trial court noted that the defendant's guilty plea incorporated five separate offenses over a period of time spanning at least three months. The trial court also noted its agreement with the state's argument, which included the state's asking the trial court to consider that

“[t]he defendant is convicted of two or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship. Which we have heard they are next door neighbors. This child was trusted in the care, as a friend of the granddaughter, spent nights over there. The relationship between the defendant and the victim . . . , the time span of defendant's undetected sexual activity. And here we have, per his own statement, from December of '03 through February of '04.

. . . .

And the nature and the scope of the sexual acts to the extent residual, physical and mental damage to the victim . . . . And I would just draw the Court's attention

... to the demeanor of the victim on the stand today. Also the testimony about some of the problems she's had . . . .

After our de novo review, we conclude that Tennessee Code Annotated section 40-35-115(b)(5) supports consecutive sentencing in this case. Here, the defendant stands convicted of five counts of aggravated sexual battery, spanning at least a three month period and arising out of the defendant's position of trust with the victim. The victim testified as to the impact of the defendant's actions on her and the damage to her relationships with members of her family. Therefore, there is sufficient justification for ordering consecutive sentencing.

### **Alternative Sentencing**

The defendant lastly argues that the trial court erred in denying him alternative sentencing. We note, a defendant is presumed to be a favorable candidate for alternative sentencing if the defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. *Id.* § 40-35-102(6). If, however, a defendant is convicted of a Class A or B felony, then he or she is not entitled to a presumption in favor of alternative sentencing and "the state ha[s] no burden of justifying confinement through demonstrating the presence of any of the considerations upon which confinement may be based." *State v. Joshua L. Webster*, No. E1999-02203-CCA-R3-CD, 2000 WL 1772518, at \*2 (Tenn. Crim. App., at Knoxville, Dec. 4, 2000); *see State v. Zeolia*, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996) (state must justify confinement by showing "evidence to the contrary" when defendant is a presumptive candidate for alternative sentencing). Thus, a defendant convicted of a Class A or B felony "has the burden . . . of presenting proof of his worthiness for consideration of alternative sentencing." *State v. Larry Lenord Frazier*, No. M2003-00808-CCA-R3-CD, 2004 WL 49112, at \*4 (Tenn. Crim. App., at Nashville, Jan. 8, 2004).

Tennessee Code Annotated section 40-35-103 provides guidance as to whether the trial court should grant alternative sentencing or sentence the defendant to total confinement. Sentences involving confinement should be based upon the following considerations:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. . . .

. . . .

(5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. . . .

*Id.* § 40-35-103(1), -(5). The trial court may also consider the mitigating and enhancement factors set forth in Tennessee Code Annotated sections 40-35-113 and 114 as they are relevant to the section 40-35-103 considerations. *Id.* § 40-35-210(b)(5); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996).

A defendant is eligible for probation if the actual sentence imposed is eight years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. *See* Tenn. Code Ann. § 40-35-303(a) (2003). A trial court shall automatically consider probation as a sentencing alternative for eligible defendants. *Id.* § 40-35-303(b). However, entitlement to probation is not automatic and the defendant still bears the burden of proving suitability for full probation. *Id.*, Sentencing Commission Comments; *State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997).

As one convicted of a Class B felony, the defendant was not a presumed favorable candidate for alternative sentencing. Therefore, the state had no burden of justifying a sentence of confinement. Additionally, the defendant was not eligible for probation because he was convicted of aggravated sexual battery, a specifically excluded offense. Furthermore, we are unpersuaded that the defendant is remorseful for his actions which reflects poorly on his potential for rehabilitation. In his confession, he repeatedly alleged that the victim manipulated him into touching her by wearing revealing clothes. In our view, blaming an eleven or twelve-year-old child for one's actions indicates a lack of remorse. Accordingly, after our de novo review of the record, we conclude the trial court properly denied alternative sentencing.

### CONCLUSION

Based on the foregoing reasoning and authorities, we affirm the judgments of the trial court.

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J.C. McLIN, JUDGE